

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 1999-259-C - ORDER NO. 1999-673

SEPTEMBER 22, 1999

IN RE: Petition of ITC^DeltaCom Communications,) ORDER DENYING *✓ NR*
Inc. for Arbitration of an Interconnection with) MOTION TO COMPEL
BellSouth Telecommunications, Inc. Pursuant)
to the Telecommunications Act of 1996.)

This matter comes before the Public Service Commission of South Carolina ("Commission") on the Motion to Compel filed by ITC^DeltaCom Communications, Inc. ("ITC^DeltaCOM"). By its Motion, ITC^DeltaCom requests the Commission to issue an order compelling BellSouth Telecommunications, Inc ("BellSouth") to respond to certain interrogatories propounded by ITC^DeltaCom.

ITC^DeltaCom asserts that BellSouth's responses to ITC^DeltaCom's interrogatories are incomplete and that further response is necessary. Further, ITC^DeltaCom alleges that the disputed discovery seeks information which is relevant to the issues before the Commission or is likely to lead to the discovery of admissible evidence regarding issues in the instant proceeding. Specifically, ITC^DeltaCom's Motion applies to Interrogatory No. 1-3 which requests that BellSouth "provide copies of BellSouth's recent ADSL FCC tariff filing, Transmittal No. 513, with Exhibits A and B (Proprietary Version) and BellSouth's ADSL tariff filing that was effective September 8, 1998, with Exhibits A and B (Proprietary Version)." Motion, p. 2, ¶ 4.

BellSouth filed a Response to ITC^DeltaCom's Motion and asserted that the disputed interrogatory sought information that was not relevant to the proceeding and not reasonably calculated to lead to the discovery of admissible evidence. Further, BellSouth

states that ITC^DeltaCom is using the discovery process in the instant proceeding “to obtain highly sensitive competitive information for market purposes.” BellSouth Response, pp. 1-2. BellSouth also alleges that the only applicable issue for which ITC^DeltaCom would be seeking the requested information concerns ITC^DeltaCom’s request for certain unbundled network elements (“UNEs”). BellSouth contends that ITC^DeltaCom’s request is not relevant to the instant proceeding in as much as the rates for UNEs have been established in a generic cost proceeding and the instant proceeding is not the proper forum in which to re-litigate the costs of UNEs previously established by the Commission. BellSouth Response, p. 2. Further, BellSouth states that “the unbundled ADSL compatible loop offering, which is what ITC^DeltaCom is seeking in its Arbitration, is completely different than the federally tariffed wholesale ADSL service offering by BellSouth.” BellSouth Response, p. 3. BellSouth also maintains that the cost studies completed to support the UNE offering are totally different from the cost studies done to support the wholesale offering filed with the FCC and that the cost studies cannot and should not be compared. BellSouth Response, p. 7.

In a letter filed in reply to BellSouth’s Response, ITC^DeltaCom asserts that the proprietary version of BellSouth’s ADSL FCC tariff filing contains cost information for a function that is the same as that function necessary for providing UNE ADSL-compatible loops. ITC^DeltaCom’s Reply, p. 1. Further, ITC^DeltaCom asserts that BellSouth’s relevance argument is not an appropriate basis for denying production of discovery, given the broad scope of discovery in South Carolina. In support of its position, ITC^DeltaCom states that its request is not excessive but is pertinent to the issues at hand and cites the case of *Samples v. Mitchell* for the proposition that “the scope of discovery is very broad

and ‘an objection on relevance grounds is likely to limit only the most excessive discovery request.’ *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213, 215 (Ct. App. 1997) (quoting J. Flanagan, *South Carolina Civil Procedure*, 216 (2d ed. 1996)). ITC^DeltaCom also suggests that it has signed a Protective Agreement with BellSouth that will maintain the confidentiality of any material obtained in this case.

Thereafter, BellSouth filed a letter to respond to ITC^DeltaCom’s letter replying to BellSouth’s Response in this matter. BellSouth states, as noted above, that ITC^DeltaCom in its Reply stated that “ITC^DeltaCom believes that the proprietary version of BellSouth’s ADSL FCC tariff filing contains cost information for a function that is the same as that function necessary for providing ADSL-compatible loops.” ITC^DeltaCom’s Reply, p. 1. BellSouth asserts that this statement of ITC^DeltaCom is the only basis for the request to compel and that this statement is inaccurate. BellSouth informs the Commission that “the work functions for the UNE ADSL compatible loop are different from the work functions necessary to provide the tariffed ADSL service and, thus, would not support the same costs.” BellSouth Response to ITC^DeltaCom’s Reply, p. 2. Further, BellSouth states that “the cost studies supporting these different work functions are totally different” with “the UNE cost being derived from a TELRIC study done in conformance with this Commission’s cost orders” and the service offering being a TSLRIC study that studies direct long run incremental costs. BellSouth Response to ITC^DeltaCom’s Reply, p. 2. Finally, BellSouth asserts that ITC^DeltaCom’s suggestion that the Protective Agreement between the parties would allow for discovery of the information sought would “turn the usual analysis on its head.” BellSouth Response to ITC^DeltaCom’s Reply, p. 3. BellSouth offers that “a protective agreement is used in

order to provide to the Commission information necessary for its decision in a particular matter ... but is not an open pipeline into another party's valuable business information that is totally irrelevant to a particular proceeding." BellSouth Response to ITC^DeltaCom's Reply, p. 3.

Upon consideration of the Motion to Compel, the Commission finds and concludes that the Motion to Compel should be denied. While the Commission is cognizant that the scope of discovery is very broad in South Carolina, the Commission cannot grant ITC^DeltaCom's Motion to Compel. Rule 26(b)(1), SCRCF provides in part that "parties may obtain discovery of any matter not privileged, which is relevant to the subject matter in the pending action ...". Based upon the assertions from BellSouth that the work functions, the costs, and the costs studies are different and cannot be compared and that the unbundled ADSL compatible loop offering, which is what ITC^DeltaCom is seeking in its Arbitration, is completely different than the federally tariffed wholesale ADSL service offering by BellSouth, the Commission concludes that the requested discovery is not relevant to the instant proceeding.

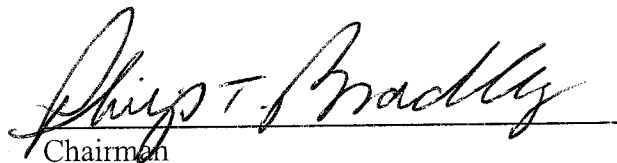
Further, the Commission recognizes the case of *Hamm v. South Carolina Public Service Commission*, 312 S.C. 238, 241, 439 S.E.2d 852, 854 (1994) which held that "when the discovery process threatens to become abusive or to create a particularized harm to a litigant or third party, the Rules allow the trial judge broad latitude in limiting the scope of discovery." In *Hamm, supra*, the court further stated that "once the party seeking a protective order has met its burden of showing good cause by alleging a particularized harm, the party seeking the discovery must come forward and show that the information sought is both relevant and necessary to the case." In the case before the

Commission, BellSouth has alleged a particularized harm in revealing valuable confidential business information. ITC^DeltaCom must then establish that the evidence sought is both relevant and necessary to its case. The Commission finds that ITC^DeltaCom has not shown either relevance or necessity of the discovery information sought. ITC^DeltaCom has alleged relevancy by stating that it believes the information sought contains cost information for a function that is the same function for providing UNE ADSL-compatible loops. However, BellSouth has countered ITC^DeltaCom's allegation with a persuasive argument and description that the material sought by ITC^DeltaCom does not contain the information which ITC^DeltaCom thinks is there. Further, ITC^DeltaCom has failed to make any showing that the information sought is necessary to its case, as required by *Hamm v. South Carolina Public Service Commission*, *supra*.

For the above stated reasons, the Commission hereby denied ITC^DeltaCom's Motion to Compel.

This Order shall remain in effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:


Chairman

ATTEST:


Executive Director

(SEAL)